ARTHUR S. CHURCHILL, ET AL.,
Appellants,
v.
OLIVER W. ALLEN, ET AL.,
Appellees.

ARTHUR S. CHURCHILL, ET AL.,
Appellants,
v.
GEORGE SMITH, ET AL.,
Appellees.

ARTHUR S. CHURCHILL, ET AL.,
Appellants
v.
HENRY L. HIGGINSON, ET AL.,
Appellees.

Appellants Brief in Reply to Briefs for Appellees.

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IN THE SUPREME COURT

OF THE UNITED STATES.

ARTHUR S. CHURCHILL, ET AL.,
Appellants,
v.
OLIVER W. AMES, ET AL.,
Appellees.

ARTHUR S. CHURCHILL, ET AL.,
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HENRY L. HIGGINSON, ET AL.,
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Appellants Brief in Reply to Briefs for Appellee's.

FIRST POINT.

Mr. Woolworth's first contention is that the Union Pacific Railway Company is not subject to such state regulation, and that, therefore, the Act is unconstitutional.

Answer: Mr. Brewer, Circuit Justice, in his opin-

ion, (page 2159 of record,) answers that point as follows:

"It is insisted that the Union Pacific Railway Company cannot be subjected to the provisions of this statute, because it is a corporation created by congress, and, as such, in the discharge of any of its functions, is subject only to the control of that body. The general question of the power of a state in respect to rates for local freight over a corporation organized under the laws of congress, was considered in *Reagan v. Mercantile Company*, 154 U. S., 413, and it was there held that the mere fact that a corporation was so organized did not exempt it from state control in that respect. It was conceded in the opinion in that case, that congress could wholly remove such a corporation from state control; but it was held that, in the absence of something in the statute indicating an intention on the part of congress to so remove it, the state had the power to prescribe the rates on all local business carried by it. Of course, that decision is controlling. It is true, there is one provision in the Union Pacific Act which tends to show an intent on the part of congress to retain to itself full control over all rates, and this is found in the 18th section of the Act, 12 Stat., 497, as follows:

"'And be it further enacted, That whenever it appears that the net earnings of the entire road and telegraph, including the amount allowed for services rendered for the United States, after deducting all expenditures including repairs and the furnishing and running and managing of said road, shall exceed ten per centum upon its cost, exclusive of the five per centum to be paid to the United States, congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law.'

"There is in these words, it will be seen, a special reservation of the power to fix rates; and when this is taken in connection with the general provision in the same section, reserving the right 'to add to, alter, amend, or repeal this Act,' there is much force in the contention that congress intended to reserve to itself, as it had the power to do, the sole and absolute control of all the

rates to be charged by the company. But I am not fully satisfied that this language warrants such a conclusion. Of course, if the Union Pacific Railway Company is not exempt from the operation of this Act, no other company is."

The above extract from the opinion is confirmed by *Reagan v. Mercantile Trust Company*, 154 U. S., 413. It is also confirmed by the reasoning in the case of *Thompson v. Pacific Railroad Company*, 9 Wall., 579, and *Railroad Company v, Penniston*, 18 Wall., 5-36.

The fixing of rates for local business upon the Union Pacific lines leaves the road perfectly free to perform all its obligations to the government, and to transport the government mails and other government property. In the language of Mr Justice Strong, in *Thompson v. Pacific Railroad Company*, 9 Wall., 579, "It leaves them free to discharge the duties they have undertaken to perform."

SECOND POINT.

Mr Woolworth, in his brief, contends that the Act is invalid by reason of section 4: "All railroads, or parts thereof, which have been built in this state since the first day of January, 1889, or may be built before the 31st day of December, 1899, shall be exempt from the provisions of this Act until the 31st day of December, 1899."

Answer: Mr. Brewer, Circuit Justice, in answer to this point in his opinion, page 2160 of the record, said:

"The right to classify is conceded; but it is said that this classification is arbitrary and depends upon no fair and reasonable difference. Attention is called to the fact that since January 1st, 1889 the Rock Island company has built a road from Omaha to Lincoln, which is a part of its main line from Chicago to Denver; that in all its business the Rock Island company

is in active competition with the several companies whose roads are subject to the provisions of this Act, and that it is an unreasonable and unjust discrimination to exempt the Rock Island company from like subjection. I cannot concur in these views. The principle of classification adopted by the legislature, whether wise or unwise, is within its power. To divide railroads into two classes, placing in one all that have been constructed and in operation for a length of time, and whose business must, therefore, be presumed to have been thoroughly established, and in the other all only recently constructed, is clearly not a mere arbitrary distinction, and this, notwithstanding it may be that one of the recently constructed roads is so fortunate as to have immediately secured a large business. The protection of infant industries is a term of frequent use in the political discussions and history of this country, and to rule that a classification based upon such principle is merely arbitrary, and therefore unconstitutional, would certainly be a judicial novelty."

Almost this precise point was decided in *Wellman v. Chicago and Grand Trunk Railway Company*, 83 Mich., 592. Section 9 of the Michigan Act, fixing passenger rates, contained this proviso: "Provided, that in future, whenever the earnings of any company doing business in this state, as reported to the commissioner of railroads at the close of any year, shall increase so as to equal or exceed the sum of $2,000 or $3000 per mile of road operated by said company, then, in such case, such company shall thereafter, upon the notification of the commissioner of railroads, be required to only receive as compensation for the transportation of any passenger and his or her ordinary baggage, not exceeding in weight 150 pounds, the rate of two cents and one-half, or two cents per mile as hereinbefore provided; provided, that roads in the upper peninsula, which report, as above provided, passenger earnings exceeding $3,000 per mile, shall not charge to exceed three cents per mile and roads reporting less than $3,000 per mile shall be allowed to charge not to exceed four cents per mile."

It was objected to the above recited provision that

it established a different rate for *different* roads, and that certain roads were not subject to its provisions until the earnings of such roads should reach a specified sum as set down in the Act.

Section 4, article 11 of the constitution of 1875 of Nebraska provides: "And the legislature may, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the *different* roads in the state."

The constitution of Michigan used the same phrase, "on *different* railroads in this state" The court, in speaking of that point, said (page 598): "This constitutional provision, beyond all doubt, authorized the legislature to fix a maximum rate, with only one limitation, to-wit, that such maximum rate shall be a reasonable one; and, in my opinion, the use of the word 'different' authorized the legislature not only in such legislation to classify the railroads, but to legislate differently for *different* roads."

It seems perfectly clear, as said in the opinion in the above case, (page 599,) "That no general law can be passed fixing maximum rates on all roads alike, without reference to cost of construction or service, the amount of their business or income, and their indebtedness, which will not give some roads undue advantage over others.

"Therefore, it seems to me that the legislature in submitting, and the people in adopting, this amendment, knowing that all general legislation in this regard must, in its consequences, operate in a certain sense as class legislation, wisely used the word 'different,' signifying, as it naturally does, that the legislature in this matter was granted power to make distinctions in legislation between different railroads in this state, if such distinctions are reasonably made."

The supreme court of Michigan held the Act to be valid.

The case was affirmed in this court, *Chicago, etc., Railway Company v. Wellman*, 143 U. S., 339.

The state having the power to make a classification of roads, it is not for the court to pass judgment on its justness. *Dow v. Beidelman*,, 125 U. S., 680.

THIRD POINT.

Mr. Woolworth's third objection to the Act is that if the statutory rates were put in force they would not yield the carrier reasonable compensation. To support this contention, he has prepared and printed in his brief, pp. 39 to 46, certain tables, which on their face purport to show that a net loss would have resulted to the roads for the years 1891, 1892, and 1893, if the rates fixed by the law had been applied.

Answer: These tables are erroneous in fact and computations are made on wrong data and incorrect principles.

To illustrate: We will take his table for the Burlington company, for the year 1892. p. 40:

"Total amount received for tons hauled locally		$1,237,884
"Deduct percentage of expenses to earnings on all business, 64.23 per cent.	$795,092	
"Additional cost of local business, 15 per cent	185,682	
"And the reduction by the bill, 29.50 per cent	365,175	1,345,949
"Loss by the bill		$ 108,065"

FIRST ERROR. Both Mr. Brewer, Circuit Justice, and Mr. Woolworth fell into the same error in stating the total amount received from local freight. We admit that Mr. Dilworth's table, p. 932, set down the total

amount received by the Burlington company for tons hauled locally to be $1,237,884.

But it appears from his testimony, p. 930, that he made the computation as one of the secretaries of the board of transportation, from reports filed in his office by the railway companies (p. 931) and not from an examination of the books of the companies. Why take this estimate made from reports, that evidently are incorrect, when we have the direct statements from the officers of the Burlington company in the sworn testimony on this point?

Mr. William Randall, the freight auditor of the Burlington company, testified that he had made an examination of the *books* of the company to enable him to testify in this case (p. 541) and that the amount received for hauling local freight in Nebraska for the year 1892 (pp. 542-543) was $1,853,036.59

He repeats same statement of amount on page 569 and explains how he computed it.

Mr. James G. Taylor, auditor and assistant treasurer of the Burlington Company, (p. 582) gives the amount earned from hauling local freight in Nebraska (p 590) 1,853,036.59

Mr. Woolworth next has Mr. Taylor produce in evidence a table, Exhibit 7, (p. 593) in which table the local freight earnings are set down as 1,853,036.59

These figures are from the books of the companies, put in evidence by Mr. Woolworth in behalf of his clients, and as they are the parties seeking affirmative relief, they should be bound by them, and not ignore or disregard them, and substitute in their place a mere estimate, either incorrectly computed or made from reports of

the companies evidently incorrect in fact, (see original brief, pp. 89 to 92.) Having this positive testimony, why indulge in speculation?

Take this corrected statement	1,853,036.59
Deduct amount of deductions in Mr. Woolworth's computation	1,345,949.00
Net profit under rates fixed in law	$ 507,087.59

SECOND ERROR. Mr. Woolworth's computations of the amounts to be deducted from the total earnings from local freight, are erroneous and partly fictitious. We do not have to estimate or guess at the cost of the transportation of local freight, nor resort to mathematics to ascertain the same, for the reason that Mr. Woolworth's witnesses have stated the actual cost, and his clients are clearly bound by such statements.

Mr. William Randall, the freight auditor of the Burlington company, stated the operating expenses, including taxes, for local freight in Nebraska to be (page 542) for 1892, $972,183.70.

1892.

A table based on the figures of Mr. Randall, for the year 1892 would be as follows:

Total amount received for tons hauled locally		$1,853,036.59
Cost of this local business, including taxes	$972,183.70	
Deduction by the bill, 29½%	546.645.62	1,518,829.32
Net profit if the law had been in force		$ 334,207.27

THIRD ERROR. Mr. Woolworth had the witness, Mr. Dilworth, compile a table, which Mr. Woolworth introduced in evidence as a part of his case, (Exhibit 20,

page 980) in which table is set down, in the third column, the number of tons of local freight carried one mile, and which, for the year 1892, was..... 91,139,965.00

Mr. Woolworth had his witness, Mr. Randall, and also Mr. Taylor, testify as above set down (pages 544, 591 and 593) that the earnings in 1892 per ton per mile were 2.079 cents. This would give the gross earnings for local freight..... $1,894,799.87

Subtract the amount of deductions in Mr. Woolworth's table..... $1,345,949.00

Net profit, if law had been in force.... $ 548,850.87

1891.

Making a similar computation from the same table, and from the testimony of the witnesses Randall and Taylor, for the year 1891, we have the following result:

Number of tons hauled locally one mile..... 73,075,310

Computed at 2,079 cents..... $1,519,235.69

Subtract the amount of deductions in Mr. Woolworth's table..... 1,181,451.00

Net profit if the law had been in force. $ 337,784.69

1893.

A similar computation for the year 1893 gives the following result:

Number of tons of local freight carried one mile..... 93,793,675

Gross earnings at 2.079 cents per ton per mile..... $1,949,970.50

Amount to be deducted by Mr. Woolworth's table..... 1,336,780.00

Net profit if law had been in force.... $ 613,190.50

FOURTH ERROR. Mr. Woolworth, in determining

the amount to be deducted for expenses, uses the same table (Exhibit 20, page 980) which we have used in the foregoing computations, the last column of which table gives the percentage of expenses to earnings, and for the year 1892 he deducts 64.23 per cent., and then makes a further deduction of 15 per cent. on account of the additional cost of local business.

This is erroneous, because in the percentage set down in Exhibit 20, page 980, there is already included in the first column the number of tons of freight carried locally. The result is that the cost of the local freight business entered into the 64.23 per cent. set down in the last column of said table. To deduct 15 per cent. additional for the cost of local business is to deduct that item twice.

Mr. Brewer, Circuit Justice, evidently saw this point, for in the table in his opinion (p. 2173 of record) he did not add the 15 per cent., as Mr. Woolworth does in his table. The result must be that from Mr. Woolworth's calculations there must be taken out the item representing the 15 per cent. When that item is deducted, Mr. Woolworth's tables would leave a profit, instead of a loss. This applies to all his tables for all roads.

Fifth Error. A more flagrant error touching Mr. Woolworth's computation of the 15 per cent. lies in this: Mr. Woolworth, by the computation in his table, does not add to the cost of through business 15 per cent., to represent the cost of local business, but he computes that 15 per cent. upon the gross amount *received* for hauling freight, instead of computing it upon the *cost* of hauling freight. Under no circumstances should he deduct the item of 15 per cent., as he has computed it.

To make this point clear we will illustrate it. Take

the Burlington table for 1892. The item $795,092 is intended to represent the cost of hauling the freight. He then desires to add to this cost 15 per cent., as he claims local freight costs 15 per cent. more to handle than through freight. Instead of computing the 15 per cent. on the cost of hauling freight ($795,092) he computes 15 per cent. on $1,237,884, the gross amount received for hauling the freight, which is $185,682, and deducts this item as an expense.

This error runs through all of Mr. Woolworth's tables, hence all should be rejected.

SIXTH ERROR. Union Pacific for the year 1893.

Mr. Woolworth's table states the total amount received for tons hauled locally to be	$ 413,714.00
Mr. Woolworth examined Mr. Andrew S. Van Kuran, auditor of the Union Pacific system, on this point, (page 617) and he was the only witness examined upon this point. He stated the freight earnings of the Union Pacific Railway Company within the state of Nebraska for the year ending June 30th, 1893, to be. (Page 618.)	4,313,204.46
He was next asked by Mr. Woolworth what per cent. of this was business beginning and ending in the state of Nebraska, and he answered that it was 15 per cent. (page 618.) This makes the amount received for business beginning and ending in the state of Nebraska	$ 646,980.00
Amount stated by Mr. Woolworth's table	413,714.00
Van Kuran's estimate therefore exceeds the amount set down in Mr. Woolworth's table by	$ 233,266.00

(See original brief, page 92.)

A corrected table, according to Mr. Van Kuran's testimony of the amount received, is as follows:

Amount received on account of local freight	$646,980
Deduct amount of deductions in Mr. Woolworth's table	426,166
Net profit	$220,814
This should be further increased by the 15% which Mr. Woolworfh erroneously deducted, as heretofore explained	$ 62,057
Leaving net profit	$282,871

SEVENTH ERROR. There is a way to compute the earnings as well as the cost of hauling local freight in Nebraska by the Union Pacific Railway Company, from the testimony of Mr Van Kuran, the auditor of that company, coupled with the data in Exhibit 20, page 980 of record, also introduced in evidence by Mr. Woolworth, as follows, to-wit:

1893.

Number of tons of local freight carried one mile by Union Pacific railway	45,948,736
Rate per ton per mile on strictly local freight in Nebraska, stated by Mr Van Kuran, (page 618)	1.984 cents
The gross receipts from local freight would be	$ 895,081.37
Cost of carriage per ton per mile, according to Mr. Van Kuran's testimony (page 618) was	1.135 cents
Total cost of carriage of tons carried locally	$ 521,518.15
Net profit	$ 373,563.22
Deduct 29¼% of gross receipts	264,049.00
Net profits if rates in new law had been in force	$ 109,514.22

1891.

Applying the same data to a computation for the year 1891, we have the following result:

Number of tons of local freight carried one mile by Union Pacific railway		28,908,124
Gross receipts from local freight	$	573,537.18
Total cost of carriage of tons carried locally		328,107.20
Net profit	$	245,429.98
Deduct 29½% of gross receipts		169,193.46
Net profit, if rates in new law had been in force	$	76,236.52

1892.

The same data applied to the business of the year 1892 give the following result:

Number of tons of local freight carried one mile by Union Pacific railway		42,970,322
Gross receipts from local freight	$	852,531.18
Total cost of carriage of tons carried locally		487,713.15
Net profit	$	364,818.03
Deduct 29½% of gross receipts		251,496.69
Net profit if rates in new law had been in force	$	113,321.34

Comment: It thus appears that the amount set down in Mr. Woolworth's table, representing the gross earnings from local freight in both the Burlington case and the Union Pacific case is erroneous, evidently because the railway companies have not reported to the state board of transportation the true amount of such earnings, as appears from the sworn testimony of the railway auditors given in this case. In making the com-

putations in this case, we should take the sworn testimony of the auditors of the railway companies, instead of an estimate from reports which the railway companies may have made to the state board of transportation.

The same principle must apply to the computations in Mr. Woolworth's brief for the subordinate or branch lines; hence, all his tables must be discarded.

EIGHTH ERROR. On page 46 of Mr. Woolworth's brief, he makes another computation for the Burlington company, based on the testimony of Mr. Taylor, the auditor of that company, as follows:

Earnings		$1,853,036.50
Deduct expense	$1,221,742.84	
15% excess on local	183,356.30	
29½% reduction by the bill	546,645.62	1,951,744.76
Loss		$ 98,608.26

Comment: This table is erroneous. Mr. Taylor, in answer to the question, (page 590) "What were the operating expenses for business beginning and ending in this state?" answered in figures, (page 951) $1,221,-742.84. This sum being the total cost of hauling local freight, it was erroneous for Mr. Woolworth to deduct an additional 15% for the cost of local business.

A corrected table, computed on the basis of Mr. Taylor's testimony, would be as follows:

Receipts from local freight	$1,853,036.59
Expenses for local freight	1,221,742.84
Leaving net profit	$ 631,293.75
Deduct, 29½ % if new law had been in force	546,645.62
Net profit if new law had been in force.	$ 84,648.13

(See our original brief, page 91.)

We still insist that the expense of carrying local freight was not $1,221,742.84, as stated by Mr. Taylor, but that the correct amount was $972 183.70, as first stated by Auditor Randall, as shown in our original brief, pages 89 and 90, which would leave the net profit, if the new law had been in force, as set down in this brief under the heading—Second Error $334,207.27

NINTH ERROR. *Under no circumstances do we concede that the cost of doing local business is 15 per cent. greater than the cost of doing general business.*

At the time of the taking the testimony in this case, Mr. Utt was not engaged in railway business in the state of Nebraska. Mr. Fink was never engaged in railway business in the state of Nebraska. Mr. Woolworth's witness, Mr. Randall, the expert of the Burlington road, was the only witness actually engaged in railway business in Nebraska, who testified upon the point of the difference in cost, if any, between local and through business.

Mr. Fink and Mr. Utt, in their estimates, were speaking of local business transacted purely as such by the use of local trains. As a matter of fact, that is not the way the local freight business is done in Nebraska, as appears by the testimony of Mr. Randall (page 546.):

"Q. Well, I wish you would explain the manner of doing local and interstate business, with reference to carriage, cost, earnings and employees?"

"A. Practically, there is no difference. It is all done on the same plan. * * *

"But within the state of Nebraska local business and through business are done under identically the same conditions, *and at the same expense.*"

Mr. Randall explains why this is so (pages 546 and 547). (See our original brief, pages 105-6.)

TENTH ERROR: In all Mr. Woolworth's tables as well as in the table in the opinion of Mr. Brewer, Circuit Justice (page 2173 of record), there is deducted what purports to represent the percentage of expenses to earnings. That percentage is taken from the last column of Exhibit 20, page 980 of record.

The percentage in that table was evidently computed upon the basis of the column in Exhibit 19 (page 977 of record), purporting to represent the total amount received for freight carried locally for the years 1891 and 1893, and from the amount set down in Exhibit 4 (page 932 of record), in the column headed "Total amount received for tons hauled locally."

We have heretofore shown in this brief, from the testimony of Mr. Randall, Mr. Taylor and Mr. Van Kuran, and by the computations made from their testimony, and on the basis of the number of tons of local freight carried one mile, as set down in Exhibit 20 (page 980 of record) that the gross amount received for freight hauled locally was much greater than that reported by the railways to the state board of transportation; hence the per-centage taken from the table Exhibit 20 (page 980 of record) by Mr. Woolworth is too high. In other words, if the gross receipts for local freight were larger than the amount set down in Exhibits 4 and 19, then the per-centage which the expenses would bear to the receipts would be reduced in like ratio.

We have heretofore shown by taking the tonnage set down in Exhibit 20, and multiplying it by the rates

which the officers of the railway company testified were received per ton per mile, that the gross receipts for local freight were greater than the sum set down in Exhibit 4 and Exhibit 19; hence the computation of the per-centage of the expenses to earnings were likewise erroneous. The result is that in the tables in Mr. Woolworth's brief, he deducted too large a per-centage and Mr. Brewer, Circuit Justice, fell into the same error in his table (page 2173 of the record.)

Our point is, not that the tonnage was greater than set down in those tables, but that the amounts received for hauling freight were greater than set down in the tables. The result is that the expense of carrying is not increased, as there was no increased tonnage, but the revenues were increased. The further result is that the percentage of expenses to earnings must be necessarily reduced in like ratio.

ELEVENTH ERROR. Mr. Woolworth assumes in his brief (page 47) that the business of the railroads decreased after 1892 The table, Exhibit 20, (page 980 of record) being the table from which he takes his per-centage of expenses to earnings, discloses that there was a constant increase in local business upon all of the roads, as follows:

Name of road.	**1891.** No. tons carried locally.
B. & M. R. R. R. in Neb	538,824
C. St. P. M. & O	64,496
F. E. & M. V	141,056
U. P. Ry	152,028
O. & R. V	61,448
St. J. & G. I	25,078
K. C. & O	8,743

1892.

B. & M. R. R. R. in Neb.	574,653
C. St. P. M. & O	65,762
F. E. & M. V	158,350
U. P. Ry	192,865
O. & R. V	63,999
St. J. & G. I	39,657
K. C. & O	10,823

1893.

B. & M. R. R. R. in Neb.	583,294
C. St. P. M. & O	78,753
F. E. & M. V	187,804
U. P. Ry	220,061
O. & R. V	68,237
St. J. & G. I	50,452
K. C. & O	15,484

It is also erroneous to assume that the business of the roads would diminish if the reduced rates fixed in the law were in force. The proof of the record is that the tonnage would increase, and hence increase revenues.

A reduction of rates increases the amount of traffic.

Mr. Dilworth testified (page 1003 of record:) "I think it would not be disputed that a reduction of rates will increase tonnage." He gives an illustration (page 1004 of record) where a reduction of rates 25% increased the tonnage 400%. He further testified (page 1005 of record) that a reduction of rates in Iowa increased the net earnings of the Iowa roads. He further testified (page 1005) that in his opinion a reduction of rates would increase the tonnage in Nebraska, and he added, "I believe they would clean up as much money as they do now." (See our original brief, pages 84 to 87.)

If Mr. Dilworth is right upon this point, then it is erroneous in the computations made by Mr. Woolworth to deduct the 29 ½ per cent. from the existing gross receipts,

as such deduction assumes that the amount of tonnage must remain the same, under the reduced rates.

If the reduced rates would so increase the tonnage that the net revenues under the reduced rates would be equal to or greater than the net revenues under the rates existing in 1891, 1892 and 1893, then it would be clearly erroneous to make this deduction of 29 ½ per cent., as set down in Mr. Woolworth's tables.

In view of the fact that Mr. Dilworth was the only witness who testified upon that point in this case, Mr. Woolworth's clients are concluded by the testimony, so far as these suits are concerned.

If we strike out of Mr. Woolworth's tables this imaginary reduction of income, which he has computed on the basis of 29½ per cent., the new law would leave confessedly a large net profit on all of the roads involved in this controversy.

As a matter of *law*, we are entitled to insist that the reduction of rates does not necessarily result in a reduction of income.

In *Chicago, etc., Railway Company v. Wellman*, 143 U. S., 343, Mr. Justice Brewer, said:

"Must it be declared as a matter of law that a reduction of rates necessarily diminishes income? May it not be possible, indeed does not all experience suggest the probability that a reduction of rates will increase the amount of business and therefore the earnings? At any rate, must the court assume that it has no such effect, and ignoring all other considerations, hold as a matter of law that a reduction of rates necessarily diminishes the earnings?"

This language is quoted with approval by Mr. Justice Shiras, in *St. L. & San Francisco Railway v. Gill*, 156 U. S., 660.

It is worthy of note that in *Reagan v. Farmers Loan*

& Trust Company, 154 U. S., 404. The bill negatived "the probability of any increase in amount of business, to compensate for the reduction in rates," and that case was submitted on the demurrer to the bill. In the case at bar the proof is to the contrary on this point.

Independent of increased tonnage, the enforcement of the rates fixed in the law would increase the gross earnings to the extent of the difference between the amount realized on the low rates spoken of in the record as differentials, and the rates which the roads would charge under the law.

The point is this: The record shows that the railways have been allowing a very low or favored rate from Missouri River points to points west of a line drawn north and south through the cities of Fremont, Lincoln and Beatrice. These rates are spoken of in the record as differentials. These differentials equal about one-third of the rates which the roads would be permitted to charge under the law.

Mr. Dilworth states it in this way (page 1020 of the record): "In other words, if the railroads complied with the Newberry bill, they would charge on this freight from the Missouri River to Lincoln, about three times as much as the rate which the railroads themselves have in force." (See Mr. Dilworth's testimony, from page 1017 to 1021 of the record. Also see our original brief, pages 46 to 52.)

About one-third of the area of the state is included within the limit to which these differentials apply (See page 1032 of the record, and our original brief page 51.)

What proportion of the tonnage is affected by this differential rate, the record does not disclose, but we do know that the larger towns and cities of the state are

included within this area, namely, Omaha, Lincoln, Blair, Fremont, Beatrice, Falls City, and more than half the population of the state is included within this area, and it is but fair to assume that one-half of the local tonnage is affected by this differential rate. Mr. Utt testified that most all the local business of the state was within these limits. p. 412.

If this be so, the railway companies would be permitted under the law to increase this differential rate to three times its present amout, and thus increase their earnings on local business to three times the present amount, within the area covered by this differential, in order to equalize the rates throughout the state.

Of course, it is a voluntary matter with the railway companies whether they shall so increase the rates or not, but whereas the railway companies under the law have the right to increase this differential rate to the rate fixed under the law, and thus increase their revenues on local business, it is inaccurate to make a computation which involves a deduction of 29½ per cent. from the gross earnings of the campany on local business, because there would be no reduction whatever on all the local freight carried within the area covered by the differentials, for that rate now is only about one-third of the amount permitted to be charged under the law. (See our original breif, pages 48 and 49, and Mr. Dilworth's testimony, page 1020 of the record). But on the contrary, the earning on the local freight, now covered by the differential rates, would be increased three-fold.

Twelfth Error. Mr. Woolworth's tables, from pages 48 to 52 of his brief, are subject to the objections heretofore made, and are likewise erroneous in computation.

1892.

For illustration, the Burlington for the year 1892:

"Percentage of expenses to earnings	64.23
"Additional cost of local business	15.00
"And deduction by bill	29.50
"Total	$108.73

"Loss by the bill 8.75%"

We can illustrate the error as follows:

According to Auditor Randall's testimony, the earnings from local freight for 1892 were	$1,853,036.59
Cost of hauling local freight, including taxes	972,183.70
Percentage of expenses, including taxes, to earnings on local business	52.35%
Add reduction by the bill	29.50%
Total	81.85%
Net gain under the bill	18.15%

If we take Mr. Taylor's testimony as giving the correct figures, we have:

Gross earnings from local business	$1,853,036.59
Total expenses on local business, including taxes	1,221,742.84
Percentage of expenses to earnings	65.93%
Reduction by the bill	29.50%
Total	93.43%
Net gain under the bill	4.57%

The same princeple will apply to his other tables, and this refutes his calculation of a loss.

1892.

Table of profits computed on amount received and

cost per ton per mile, according to Randall's testimony, Auditor of the Burlington company.

Earnings per ton per mile (p. 544)	2.079 cents
Reduced earnings 29½%, or 29½% of 2,079 is	.6133 "
Leaving earnings per ton per mile	1.4657 "
Cost per ton per mile (p. 543)	1.091 "
Net margin of profit per ton per mile	.3747 "
Tons hauled locally per mile 1892 (p. 980)	91,139,965
Still leaving a profit on local freight of	$341,501.45

Mr. Randall did not change these per-centages, and coming from the Auditor of the Burlington company, the company must be held bound by them.

It is Erroneous to Base the Reasonableness or Unreasonableness of the Rates upon a Calculation Based on the Proposition that the Net Revenues from the Local Business Must Leave a Net Profit upon the Mileage of the Respective Roads Within the Limits of the State.

1. In the business management of railways it has always been found impracticable to keep accounts or establish rates upon that theory.

2. A railway line is an entirety.

3. Its income goes into a common fund.

4. Its expense account is paid out of a common fund.

5. Its capitalization is upon its entire line.

6. The same train that carries through freight, also carries local freight.

7. There is no way of estimating the expenses on local freight, or of apportioning repairs to local freight, or of apportioning the expense of operating a train to the local frieght, or of apportioning taxes to the local freght, except upon mere estimates.

8. If the local rates of fright must yield a profit on the mileage within a state, then logically it should yield a profit on each separate portion of the line within the state.

9. All agree that some portions of a line within the state are more expensive to construct, and more expensive to maintain and operate than other portions, by reason of the topography of the country, and from other causes.

(See discussion of these questions in our original brief, pages 107 to 113.)

It is Likewise Erroneous to Say That the Rates Must be Such as Shall Yield a Net Profit to Each of the Different Lines of Road.

1. This may be true theoretically, but not when practically applied.

FIRST ILLUSTRATION: The Burlington line from Omaha to Lincoln is 54 miles; the Omaha and Republican Valley line from Omaha to Lincoln is 95 miles. The Burlington line has been profitable, and the Omaha and Republican Valley line unprofitable.

A rate from Omaha to Lincoln over the Burlington

line which would yield a profit to that company, might not yield a profit on the Omaha and Republican Valley line.

Will the court judicially declare that the rate which yields a profit to the Burlington line from Omaha to Lincoln is a reasonable rate, and judicially declare that the same rate is an unreasonable rate for the Omaha and Republican Valley line.

If the rates must be high enough, to yield a profit to the Republican Valley, then a premium is offered to the building of circuitous valley line?

SECOND ILLUSTRATION: The Fremont, Elkhorn and Missouri Valley Railroad was constructed through the northwestern part of the state, where the country was unimproved and practically uninhabited, the object being to reach the mining regions of Dakota. This line being a part of the Northwestern system, that system procured the transportation of valuable freight from Dakota to Chicago, and this long haul made the road profitable to the system. If the road were dependent upon its local business, it might meet with an annual deficit.

If the courts are to judicially declare that the local tariff rates must yield a net profit, then the rates must increase in the ratio that the tonnage decreases. On this theory, if there be a limited amount of local tonnage, the rates must be enormously high.

If it is to be judiciously declared that the rates on local freight must yield a net profit on each of the different lines then what would a reasonable rate on the main line of the Burlington and on the main line of the Union Pacific, would be an unreasonable rate on

the Fremont, Elkhorn and Missouri Valley, because the same rate on that road would not yield a profit.

The logic of the principle goes further, because on this theory of a net profit, the legislature would have to fix a higher rate for the Fremont, Elkhorn and Missouri Valley than it would fix for the Burlington or the Union Pacific.

The converse of the proposition must also be true. If the local rates of the Fremont, Elkhorn and Missouri Valley must yield a net profit to be judicially determined to be a reasonable rate, then the same rate would yield an enormous profit to the Union Pacific and the Burlington, and it would, as applied to those lines, be unreasonable in that it would be excessive as to shippers on those lines.

Again, if a reasonable rate is one that yields a reasonable net profit on the respective lines, it logically follows that a rate which yields a greater profit to one road than to another is an unreasonable rate to the extent that it is excessive or yields a greater profit to one road than it yields to another.

On this theory of local rates yielding a net profit to the respective roads, no maximum freight rate could be established by any legislature, unless a separate rate was established for each separate line of road.

This theory of establishing rates would make the question of the reasonableness of a rate dependent upon whether the road was one easily constructed or expensive to be constructed, and upon whether it ran upon a circuitous or upon a straight line; upon whether it ran through a thickly populated district or through a sparsely settled district; or whether it ran by or through large cities or through a farming country.

THIRD ILLUSTRATION: The local rates between

Omaha and Lincoln on the Burlington road yield a profit. The Chicago, Rock Island and the Pacific operates a line between Omaha and Lincoln, and that company is not here complaining of the rates. Suppose two more lines were built between Omaha and Lincoln, so as to subdivide the present amount of local tonnage between four roads, which would thereby reduce the income of the present companies one-half, would the courts then judicially declare that the rates should be doubled in order to yield a profit to four roads?

This is answered in the negative by Mr. Justice Harlan in *Covington & Lexington Turnpike Co. v. Sandford*, 164 U. S., 596.

(For a further discussion of these propositions, see our original brief, pages 112 to 116).

There is no inflexeble rule of law which requires that the rates shall yield a profit to the company.

The interest of the public must be taken into consideration.

In the opinion of Mr. Justice Harlan in *Covington and Lexington Turnpike Road v. Sanford*, 164 U. S. 578, is found the following:

"It cannot be said that a corporation operating a public highway is entitled as of right and *without refenence to the interests of the public*, to realize a given per cent. upon its capital stock." (page 596.) * * *

"The rights of the *public* are not to be ignored." (p. 596.) * * *

"If the establishing of new lines of transportation should cause a diminution of the number of those who need to use a turnpike road, and, consequently, a diminution of the tolls collected, that is not, in itself, a sufficient reason why the corporation operating the road should be allowed to maintain rates that would be unjust to those who must or do use its property. The

public cannot properly be subjected to unreasonable rates in order simply that the stockholders may earn dividends." (p. 596). * * *

If a corporation cannot maintain such a highway and earn dividends for the stockholders, it is a misfortune for it and them, which the constitution does not require to be remedied by imposing unjust burdens upon the public." (.597). * * *

"Its duty is to take into consideration the interests both of the *public* and of the owner of the property." (p. 597.)

In *Budd v. New York*, 143 U. S., 517, the rates fixed by the act of the legislature of New York for handling grain did not allow any profit over and above the cost of the work, and this court held that the law was not unconstitutional for that reason.

This court further held in that case that the mere fact that the rates fixed did not allow a profit, was not a confiscation of property nor a taking of property without due process of law.

Mr. Justice Blatchford, in stating the opinion of the court, said (p. 548.)

"In the cases before us, the records do not show that the charges fixed by the statute are unreasonable, or that property has been taken without due process of law, or that there had been any denial of the equal protection of the laws; even if under any circumstances we could determine that the maximum rate fixed by the legislature was unreasonable."

That this point was sharpely drawn in that case, appears from the dissenting opinion of Mr. Justice Brewer, when he said (p. 551):

"I dissent specially in these cases, because the statute in effect compels service without compensation."

Again, in *Budd v. New York*, p. 547, it was said:

"And that it did not appear that there had been

any such confiscation of property as amounted to a taking of it without due process of law."

This statement clearly implies that it is the taking away of property, as a confiscation of the property, that amounts to the taking of property without due process of law.

When the rates allowed pay the cost of operation, no property is confiscated or taken away.

A law which prevents a man from acquiring a profit or future earnings upon that which he hath, is not the taking away of that which he hath.

In *St. Louis & San Francisco Railway Company v. Gill*, 156 U. S., 649, it was ruled by this court that it was not necessary that a rate should yield a profit upon branch or subsidiary lines, and that whereas the St. Louis, Arkansas and Texas Railway had become a part of the St. Louis and San Francisco Company, the inquiry was not whether the rates allowed a profit upon the St. Louis, Arkansas and Texas Railway line, but whether the rate was a reasonable one when applied to the entire mileage of the St. Louis and San Francisco Railway Company, within the state of Arkansas.

So in the case at bar, the only lines on which there is a deficit, according to the table prepared by Mr. Brewer, Circuit Justice, are subsidiary lines, to-wit: the Fremont, Elkhorn and Missouri Valley, which is a part of the Northwestern system; the Omaha and Republican Valley, the St. Joseph and Grand Island, and the Kansas City and Omaha, which are parts of the Union Pacific system.

When those rates, according to that table, are applied to the respective principal railway systems, and not to the subsidiary lines, each system would receive

a net profit on the local tonnage within the state, under the rates set down in the law.

The language of this court in many preceding cases was that the companies could not be required to carry persons and property "*without reward*" and "*without compensation.*" The effort is now made to have these phrases construed as meaning "*without a net profit.*" The two things are different.

Interests of the public: The conditions in Iowa and Nebraska are similar. It must be conceded, on the proofs in this record, that the local rates in Iowa are 40 to 50 per cent. higher than the local rates in Nebraska, and that the rates fixed in the law are higher than the existing rates in the state of Iowa. (See Mr. Dilworth's testimony, p. 1023; also our original brief, pp. 66 and 67; and also Exhibit D, page 306.)

This table Mr. Dilworth testified to as being correct. (p. 1024.)

To the point that the conditions in Iowa and Nebraska are similar, see our original brief, pp. 62 to 66.

Again, local rates in Nebraska are higher than in the surrounding states, and the profit is greater in Nebraska than in the surrounding states.

Again, the profit to the Burlington company on its local business in the State of Nebraska is greater than the profit on its general business, including inter-state business.

Mr. Taylor, the Auditor of the Burlington company, testified (p. 607):

"Q. The rates earned on the lines in Nebraska is 2.079 cents?

"A. The average rate per ton per mile earned is 2.079 cents.

"Q And on your system west of the river it is 1.340 cents?

"A. Yes, sir.

"Q. Will you explain to me how your rate on earnings comes to be so much larger in this state than it is on your system as an entirety?

"A. That I cannot tell"

While Mr. Taylor cannot explain how it comes that the earnings in Nebraska are greater than they are elsewhere on its lines, the solution, however, is found in this record. *It is because the company is permitted to charge local rates in the state of Nebraska 40 and 50 per cent. higher than the company charges in the state of Iowa, and some 40 per cent. higher than they are permitted to charge in Wisconsin, Minnesota, Dakota and Kansas.*

Comment: The conditions being substantially similar, does not the interest of the public require that the rates in Nebraska shall be reduced substantially to the rates in Iowa and the other surrounding states?

If the rates in Nebraska are to be maintained at a point 40 to 50 per cent. higher than in the surrounding states, are not the railway companies thereby permitted to exact unreasonable tribute from Nebraska shippers?

Are not Nebraska shippers thereby compelled to pay the railway companies a larger per-centage of the value of their products than is paid by neighboring states?

Is that not taking the property of the Nebraska shipper and producer without just compensation, and without due process of law?

The evidence in this case was taken at a time when there was a drought in western Nebraska and a depres-

sion in business. Upon the theory that the railway companies were still entitled to earn a profit, the logic of this would be that the railway companies would be justified in increasing rates in the ratio of the decrease in business.

The converse of the proposition would be true. In times of financial depression all other values go down, and railway rates should go down in like proportion.

Would the owner of a building be justified in increasing rents because the number of tenants diminish?

Our contention is that when the value of all articles of merchandise is reduced by reason of financial depression, that is a time when the producer and shipper have a right to ask for lower rates. We should apply the same business principles to railroad tariff rates that we would apply to the rentals of property.

When business is good values are high, and the people can afford to pay higher rates than when business is depressed and values low.

We suggest, therefore, that the criterion of what shall constitute a reasonable rate is not necessarily confined to the question of profit on each particular shipment, or the profit to be derived from local business generally, but an all-important consideration is whether the rate from point to point is a reasonable one, having reference to the distance as well as to the value of the article carried.

For a discussion of the above proposition, see our original brief, pages 76 to 84.

The Profits on Local Business not Alone to be Considered, as that Represents but a Small Part of the Profits of the Companies.

We May Consider the Net Profits on all Business When Reduced to Same Level of Rates, to Show that there will not be Confiscation, but a Reasable Profit.

The table as computed by Mr. Brewer, Circuit Justice, upon which he based his opinion (p. 2173 of record) shows that if the rates in the law had been in force, there would have been a net gain upon the main lines of road, and a small deficit on four subsidary lines.

Said table also shows a net profit from local business on the entire mileage within the state. From the table we find the following:

B. & M. in Nebraska; net profits if law had been in force	$ 77,617
C., St. P. M. & O	5,587
U. P. Ry	55,596
Total profits	$138,800
F., E. & M. V. R. R. Deficit	686
O. & R. V	19,965
St. J. & G. I	846
K. C. & O	244
Total deficit	$ 21,741
Amount of gain over deficit	$117,069

According to *Budd vs. New York*, 143 U. S., 517, here is no such confication of property as amounts to a taking of it without due process of law.

On the theory that the rates fixed must leave a margin of profit to the railroad companies, how much must that profit be?

This court has ruled that the amount of that profit is a question for the legislature to decide, and not for the court.

We make the point that this margin of profit above

stated is not the only profit left to the railway companies, but simply the profit arising from purely local busiaess.

Suppose that all the freight business within the state including inter-state business, should be reduced to a like rate per mile; in other words, if we accept the suggestion of Mr. Brewer, Circuit Justice, in his opinion (p. 2169): "If the legislature of Nebraska can put in force this tariff for local business, the legislature of other states through which these roads run, and the Congress of the United States may make corresponding reductions in the rates on all other business, local and inter-state, and the aggregate of such reductions might entirely destroy all earning capacity from the property," let us inquire what would be the effect if such general reductien took place.

U. P. Company.

According to the testimony of Mr. Van Kuran, Auditor of the Union Pacific (p. 618), all freight earnings for freight handled within the state, for the year ending June 30th, 1893, were.....$4,313,204.46

15% of the above amount would represent local business (p. 618.)

If under the reduction of rates proposed in the bill, 15% of the freight business would yield a net profit, as shown in the table of Mr. Brewer, Circuit Justice, of.....$ 55,596
The remaining 85% would yield a net profit of.. 315,044

Making a total net profit under such reduction of.....$370,640

This net profit on the freight business in the state of Nebraska would equal 3.17 per cent. on the 467.48

miles of the Union Pacific line in Nebraska, at a valuation of $25,000 per mile.

To this should be added the profit on passenger business, which is about 30 per cent. of the entire business, p. 620, and which would, at the same ratio, increase the net profits in the sum of $158,845.80
Which added to the profits on the freight business 370,640

Making a total net profit on freight and passenger business within the state of $529,485.80

This amount equals a profit of 4.53 per cent. on the total mileage of the Union Pacific in Nebraska 467.48 miles, at a valuation of $25,000 per mile.

Burlington Company.

Calculating the profits of the B. & M. company on the same basis, we have the following result:

The strictly local business of the Burlington in Nebraska represents, according to the testimony of Mr. Randall, (p. 573) 21.27 per cent. of the entire freight business of that company within the state.

If the net earnings under the bill, as stated in Mr. Brewer's table, on strictly local business namely ..... $ 77,617,00
represent 21.27 per cent. of the net earnings of the Burlington road on all freight business in Nebraska, then the remaining 78.73 per cent. would be 287,295.22

Making the net earnings of that road on its entire freight business in the state under such a reduction as is contemplated in the above statement $364,912.22

Add to this the profit on the passenger business of the road, which equals 30 per cent. of the entire business, and which profit, at the same ratio, would be (pp. 574, 576, 578, 593) 156,390.90

Making the total profit of the road on all freight and passenger business within the state $521,303.12

It must be remered that there would be no reduction of rates east of the Missouri river on any of the railway systems involved in this controversy, for the reason that the present existing local rates in Iowa are higher than the rates allowed under the Nebraska maximum freight law. (See Mr. Dilworth's testimony, p 396).

Hence, also, if Congress were to fix interstate rates on the basis of the Nebraska law, it would not reduce rates on interstate business, except on the portion within the limits of the state of Nebraska.

It must also be remembered that if through rates were to be reduced to the level of the rates fixed in the Nebraska maximum freight law, the profits from the interstate business would still be as much greater than the profits on the local business as the relative cost of transportation on interstate business is less than the cost of local business.

In other words, if computed on the basis which Mr. Woolworth employs, to-wit, that the cost on local business is 10 or 15 per cent. greater than the cost on through business, then the profits on the same level of rates would be 10 or 15 per cent. greater on through business than on local business.

In the above computation, however, we have not

added anything by way of profits on the through business, to represent this lessened cost of transportation.

When such item representing the lessened cost of transportation on through business is taken into account, then the net profits on the entire business, even when all rates shall be reduced to a level of the maximum rates prescribed in the Nebraska law, would be greater than the rates set down in the above computation.

Applying these principles to the Fremont, Elkhorn and Missouri Valley and other subsidary lines, there would be a profit on said lines, even though the rates for all business should be reduced to the level of the rates fixed in the maximum freight law.

DUE PROCESS OF LAW.

Under the table as prepared by Mr. Justice Brewer (p. 2173) which shows a net profit on the entire mileage within the state, there is no such confiscation as amounts to a taking of the railway property without due process of law.

Under the proofs and tables as we compute them, the enforcement of the rates would leave a net profit to the roads much larger than that in Mr. Justice Brewer's table.

When the rates fixed will leave a profit to the roads, this court has not decided, and we do not believe it ever will decide that the law fixing such rates is unconstitutional, as depriving the railway companies of property without due process of law.

What amounts to the taking of property without due process of law, we do not mean to discuss in this brief. We wish only to enforce one point, to-wit: that

the case as made in this record does not amount to the taking of property without due process of law.

Various expressions may be found in the opinions of this and of other courts, when discussing the point as to what amounts to a taking of property without due process of law, and which may be summarized as follows:

(*a*) Requiring a railroad corporation to carry persons or property without reward.

(*b*) Taking property for public use without just compensation.

(*c*) Such confiscation as amounts to a taking of property without due process of law.

In none of these cases, however, did it appear that the rates fixed allowed a net profit above the cost of transportation

What included in cost of transportation. In the cases at bar each of the estimates of the cost of transportation furnished by the railway companies, and used as a basis of computation in these tables, included not merely the cost of hauling the freight, but included, also all betterments, improvements, repairs and taxes.

That they included taxes, see testimony of Randall, pp. 555 and 557; also testimony of Taylor, p. 591, and table, p. 593.

That they included every expense whatever, (except interest) betterments of all kinds, like the building of station houses, repairing of roadbed, repairing of rolling stock, rebuilding of bridges, replacing of locomotives and cars which may have been destroyed, etc., see testimony of Taylor, pp. 602 and 603.

The result is that every cent of profit over the cost

of transportation is so much money which goes to the company for the benefit of the stockholders.

If the stockholders borrowed money with which to build the road, and use this net profit in paying interest on the bonded debt, that is a misfortune of the stockholders. If they had paid cash for their stock, and built the road on the money which the stock represented, there would be no bonded debt and no interest to pay.

There being thus a profit which goes to the stockholders or for their use and benefit, there is no taking of property without due process of law.

Compensation. The language of the decree makes the unconstitutionality of the act depend upon compensation. This language of the decree (p. 100) is as follows:

"And it is further declared, adjudged and decreed that the act above entitled is repugnant to the constitution of the United States, forasmuch as by the provisions of said act, the said defendant railroad companies may not exact for the transportation of freight from one point to another within this state, charges which yield to said companies, or either of them *reasonable compensation* for such services."

This is confusing, the 5th and 14th amendments to the Constitution of the United States.

5TH AMENDMENT: No person shall "be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

14TH AMENDMENT: "Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The 5th amendment only applies to cases where

the property shall be taken by the federal government, and has no application to the taking of property by a state.

Fallbrook Irrigation District v. Bradley, 164 U. S., 158.
Thornton v. Montgomery, 147 U. S., 492.
Spies v. Illinois, 123 U. S., 166, and cases there cited.

Independent of this, it is evident that the framers of the 14th amendment did not intend that the taking of property by a state without proper compensation should constitute a violation of its provisions. The taking of property without just compensation was well understood, as set down in the 5th amendment, and that language is omitted in the 14th amendment. It is evident that the taking of property "without due process of law" was intended to mean something different and distinct from the taking of property by a state without just compensation.

The framers of the 14th amendment copied the language in the 5th amendment, "of life, liberty or property without due process of law," The "taking of property without just compensation," as found in the 5th amendment, is omitted in the 14th amendment, and in lieu thereof is added the clause relating to the "equal protection of laws."

In *Fallbrook Irrigation District v. Bradley*, 164 U. S., 158, Mr. Justice Peckham used this language:

"In the 14th amendment the provision regarding the taking of private property is omitted, and the prohibition against the state is confined to its depriving any person of life, liberty or property without due process of law."

Equal protection of the laws: The fixing of a maxi-

mum freight rate is not depriving the railway company of the equal protection of the laws.

Chicago, etc., Ry. Co. vs. Iowa, 94 U. S., 155.

Mr. Chief Justice Waite, in the above case said (p. 161):

"This company, in the transaction of its business, has the same rights and is subject to the same control, as private individuals under the same circumstances. It must carry, when called upon to so do, and can charge only a reasonable sum for the carriage. In the absence of any legislative regulation upon the subject, the courts must decide for it, as they do for private persons, when controversies arise, what is reasonable. But if the legislature steps in and prescribes a maximum charge, it operates upon this corporation the same as it does upon individuals engaged in a similar business"

So in *Dow v. Biedelman*, 125 U. S., 691.

"It is equally clear that the plaintiffs in error have not been denied the equal protection of the laws."

To the point that where the rates yield a profit upon the entire mileage within the state, this court has not decided that such rates amount to such confiscation of property as amounts to a taking of it without due process of law, see the following:

In *Dow v. Beidelman*, 125 U. S., 680, it was contended that the established rates were unreasonable "by reason of the admitted fact that with the same traffic that the road now has, and charging for transportation at the rate of three cents per mile the net yearly income would pay less than one and one-half per cent. on the original cost of the road, and only a little more than two per cent. on the amount of its bonded debt." (p. 690.)

This court disposed of that matter in the following two sentences (p. 691:)

"Still less does it appear that there has been any

such confiscation as amounts to a taking of property without due process of law. It is equally clear that the plaintiffs in error have not been denied the equal protection of the laws."

In Railroad Commission Cases, 116 U. S., 307, Mr. Chief Justice Waite said (p. 331:)

"Under pretense of regulating fares and freights, a state cannot require a railroad corporation to carry persons or property without reward; nor can it do that which in law amounts to a taking of property for public use without just compensation or without due process of law. What would have this effect we need not now say, because no tariff has yet been fixed by the commission."

The above language implies no more than that there must be a reward or compensation for carrying freight; *not necessarily that there must be a profit.* This thought is enforced by the dissenting opinion of Mr. Justice Field. (p. 345).

"I am aware that this court has held that, unless restrained by express contract, the legislature of a state has a right to prescribe a maximum of charges for the transportation of persons and property over railroads within its limits; but it has not been generally supposed that different rates under certain circumstances may not be made within the maximum *in the interest both of the compauy and of the public. And the right itself must necessarily be subject to the qualification that the prescribed maximum shall at least equal the cost of the service required.*"

In *Chicago, Milwaukee & St. Paul Railway Company v. Minnesota,* 134 U. S., 418 the decision of the majority of the court turned on the point that the law deprived the railway company of any right of judicial investigation as to the reasonableness of the rates, but this court did not decide that the rates must yield a net profit.

Mr. Justice Bradley in his dissenting opinion, with

which Mr. Justice Gray and Mr. Justice Lamar concurred, said (p. 465):

"If not in terms, yet in effect, the present cases are treated as if the constitutional prohibition was, that no state shall take private property for public use without just compensation—and as if it was our duty to judge of the compensation. But there is no such clause in the constitution of the United States. The fifth amendment is prohibitory upon the federal government only, and not upon the state governments. In this matter,—just compensation for property taken for public use,—the states make their own regulations, by constitution, or otherwise. They are only required by the federal constitution to provide 'due process of law.' It was alleged in *Davidson v. New Orleans*, 96 U. S., 97, that the property assessed was not benefitted by the improvement; but we held that that was a matter with which we would not interfere; the question was, whether there was due process of law. (p. 106.) If a state court renders an unjust judgment we cannot remedy it."

In *Budd v New York*, 143 U. S., 517, the statute under consideration fixed the charges for handling grain, allowing no profit over the cost, yet this court, speaking by Mr. Justice Blatchford, said (p. 548:)

"In the cases before us, the records do not show that the charges fixed by the statute are unreasonable, or that property has been taken without due process of law, or that there has been any denial of the equal protection of the law; even if under any circumstances we could determine that the maximum rate fixed by the legislature was unreasonable."

That this point was sharply drawn in this case is disclosed by the dissenting opinion of Mr. Justice Brewer, wherein he used this language (p. 551):

"I dissent especially in these cases because the statute in effect compels service without any compensation. It provides that the parties seeking the service of the elevator 'shall only be required to pay the actual

cost of trimming or shoveling to the leg of the elevator when unloading, and trimming the cargo when loading.'"

Evidently Mr. Justice Brewer used the word "compensation" as meaning a profit over the cost of the service.

In *Reagan vs. Farmers' Loan and Trust Company*, 154 U. S., 362, Mr. Justice Brewer, delivering the opinion of the court on this point, said (p. 412):

"It is not necessary to decide, and we do not wish to be understood as laying down as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road, is conclusive that the tariff is unjust and unreasonable."

In *St. Louis & San Francisco Railway Company v. Gill*, 156 U. S., 649, the final turning point of the case seemed to rest upon the contention that the rates fixed did not pay the cost of transportation upon the road originally belonging to the St. Louis, Arkansas and Texas Railway, and that therefore the act was unconstitutional, but this court ruled that the entire mileage of the St. Louis and San Francisco Railway within the limits of the state should be taken into consideration, and that the inquiry should not be confined to the St. Louis, Arkansas and Texas Railway, and that when the whole mileage was taken into account, the deficit did not exist. and that, there not being a deficit on the entire mileage of the road within the state, the act was not unconstitutional.

Mr. Justice Shiras in delivering the opinion of the court, concluded (pp. 666 and 667):

"And upon the whole, we do not feel warranted, by all that appears in this record, in declaring invalid an act of the legislature of Arkansas which on its face

appears to be a legitimate exercise of power, and which has not been shown by clear and satisfactory evidence to operate unjustly and unreasonably, in a constitutional sense, against the plaintiff in error."

Certainly this was not an adjudication that an act would be declared unconstitutional which left a profit, however small, upon the entire mileage within the state.

Covington & Lexington Turnpike Company v. Sanford, 164 U. S., 578, turned on the point that the tariff rates would not allow sufficient income "to maintain the road and provide for its ordinary expenses, without taking into consideration any extraordinary expenses, * * * and prevents it out of its receipts from maintaining its road in proper condition for public use, *or* from earning any dividends whatever for stockholders." (p. 591.)

The question before the court did not call for a decision that it was necessary that the net income should provide a dividend to stockholders.

Much less was it necessary to decide, neither was it decided, that if the rates had allowed a net profit upon the entire mileage of the roads within the state, as in the cases at bar, the Act would have amounted to a taking of property without due process of law.

Conclusion: Our conclusion, from an examination of the cases, is that whereas the table of rates as compiled by Mr. Justice Brewer in this case allows a net profit on purely local business of $117,069, that it has never been adjudged by this court that such a rate amounts to a taking of property without due process of law.

When we add to this profit the increased profit which must necessarily arise upon inter-state business, and on the passenger business, even when reduced to

the same level of rates, our position is still stronger that the rates fixed do not amount to a taking of property without due process of law.

Again, there is no taking of property without due process of law, where the Act creates a tribunal in which the railway companies can be heard to test the reasonableness of the rates. (See section 5 of the Act, p. 13 of our original brief.)

This law is to be distinguished from the cases where the law under consideration deprived the railway companies of the right to be heard.

If the railway companies should resort to the remedy provided in the law, and the supreme court of the state should adjudge that the rates are reasonable, and should refuse to grant the relief provided for in that section, nevertheless it could not be urged that the property of the railway companies was taken without due process of law. We think that point was decided in *Fallbrook Irrigation District v. Bradley*, 164 U. S., 112.

In that case, Mr. Justice Peckham said (p. 169:)

"There can be no doubt that the board of supervisors, (if it have the power to hear the question of benefits as to which something will be said under another head of this discussion,) would be a proper and sufficient tribunal to satisfy the constitutional requirements in such case."

JNO. L. WEBSTER,
Of Counsel.

CONSTANTINE J. SMYTH,
Attorney General of Nebraska.

Note: The above brief was written in reply to the original brief of Mr. Woolworth on file in this case, and the manuscript was in the hands of the printer before we had notice or information that it was the purpose of Mr. Woolworth to file another brief.

APPENDIX.

In our original brief, from pages 93 to 97, is found a table, which was computed by an accountant, and which we supposed was correct. We find that the manner of computation therein is incorrect, and we append herewith a corrected table covering the data therein considered.

Earnings of U. P. Railway Company for year ending June 30, 1893, according to the testimony of Mr. Van Kuran. (page 617):

Mr. Van Kuran testified that the gross earnings on freight within the state of Nebraska for the year ending June 30th, 1893, on the Omaha & Ogden line, were, p. 618.	$4,313,204.46
Of which he testified that about 15% was for strictly local business, or business beginning and ending within the state of Nebraska, or	646,980
which would be the amount upon which House Roll 33 would have operated. Therefore, from that amount there should be deducted 29½%	190,859
leaving the gross earnings for said fiscal year, on strictly local freight, had House Roll 33 been in force	$ 456,121
Take the gross freight earnings of the road in Nebraska for the year named, being	$4,313,204.46
and deduct therefrom the 15% representing strictly local business, or	646,980
and this would leave	$3,666,224.46

upon which House Roll 33 would not have operated, as not representing strictly local business.

Add to this the gross earnings on

strictly local business, had House Roll 33 been in force, or 456,121

which gives the gross earnings of the road on all freight in Nebraska for said fiscal year, had House Roll 33 been in operation $4,122,345.46

Deduct total operating expenses, including taxes p. 618 ..... 2,501,935.00

leaving net earning of the Union Pacific road on freight hauled in Nebraska for the year ending June 30th, 1893, had House Roll 33 been in operation $1,620,410.46

The gross earnings of the Union Pacific, had House Roll 33 been in force, for the year ending June 30, 1893, would have been $4,122,345.46

The total operating expense during the same time, including taxes, were p. 618 .... 2,501,935.00

making a cost of 61 cents to earn each $1.00 and leaving a profit of 39 cents on each $1,00

The net earnings for the year ending June 30, 1893, had House Roll 33 been in force, would have been, as shown in the foregoing table $1,620,410.46

The mileage of the Union Pacific in Nebraska is 467.48 miles. The net earnings, as last above stated, for said fiscal year would represent a net earning on said 467.48 miles of 5% on a valuation of $69,325.33 .....

Earnings of Burlington road for 1892, according to testimony of Mr. Randall:

Mr. Randall stated (pp. 541-2) that the gross earnings of the Burlington road for the year 1892 upon strictly local business were $1,853,036.59

Had House Roll 33 been in force, there would have to be deducted from this amount of gross earnings 29½%, or 546,645.62

This would leave the gross earnings of

the Burlington road for 1892, on strictly local freight business in Nebraska, had House Roll 33 been in force..... .....$1,306,390.97

The cost of handling this strictly local business, according to the testimony of Mr. Randall, (pp. 542) was..... ..... 972,183.70

This would leave the not profit for the year 1892 on strictly local business, had House Roll 33 been in force.....$ 334,207.27

Mr. Taylor testified (p. 590) to the same gross receipts, namely..... 1,853,036.59

Deduct 29½% of gross earnings..... 546,645.62

Gross earnings for 1892 had House Roll 33 been in force.....$1,306,390.97

Mr. Taylor stated the cost of handling this strictly local business to be p. 519..... 1,221,742.84

This would leave the net profit for the year 1892 on strictly local business, had House Roll 33 been in force.....$ 84,648.13

Mr. Randall stated (p. 573) that the $1,853,036.59 representing the total earnings of the Burlington in Nebraska on strictly local business was 21.27 per cent. of the gross earnings of that road on all business in the state, which would make the gross earnings p. 573.....$8,711,972.68

If, according to Mr. Randall's testimony as first given, it cost the Burlington.. 972,183.70

to earn..... 1,853,036.59

Then it would cost 52 cents to earn each $1.00, leaving a profit of 48 cents on each dollar. 48% of $8,711,972.68 is..... 4,181,746.89

From this amount should be deducted the 29½% of gross earnings for strictly local business..... .... 546,645.62

Making the net earnings on all freights shipped by the Burlington in Nebraska....$3.635,101.27

This would be a net earning on the 2253 (p. 594) miles of the Burlington in Ne-

braska of 5% on a valuation of $32,268.98 per mile.

If, as stated in the testimony of Mr. Taylor, it cost 1,221,742.84
to earn 1,853,036.59
it would cost 65.93 cents to earn each $1.00, leaving a profit of 34.07 cents on each dollar, or a profit on the gross earnings, $8.711,972.68 of 2,968,169.09

From this deduct 29½% of the earnings on a strictly local business..... 546,645.62

Making the net earnings on all freights shipped by the Burlington in Nebraska ... $2,421,523.47

This would be a net earning on the 2253 miles of the Burlington in Nebraska of 5% on a valuation of $21,495.99 per mile, or 4% on a valuation of $26,869.98 per mile.

In above estimates nothing is added to represent the profits on passenger business. The computation is based on freight business alone, which represents 70 per cent. of entire business. There should be added to this 30 per cent. to represent passenger business.